1966

Equitable Life & Casualty Insurance Company, a Corporation v. Leon G. Pritchett, Administrator of the Estate of Mary Il Pritchett, Deceased : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LEON G. PRITCHETT, Administrator of the Estate of Mary H. Pritchett, Deceased,
Plaintiff-Respondent,

vs.

EQUITABLE LIFE & CASUALTY INSURANCE COMPANY, a corporation
Defendant-Appellant.

Case No.
10558

RESPONDENT'S BRIEF

**Appeal from Judgment of the
Third Judicial District Court for Salt Lake County, Utah
Honorable John F. Wahlquist, Judge**

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CASES CITED

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STATEMENT OF THE KIND OF CASE

This is an action brought by the administrator of the estate of Mary H. Pritchett for benefits due under a medical-surgical insurance policy and a family group hospital expense policy issued by defendant.

DISPOSITION IN THE LOWER COURT

Plaintiff was awarded a judgment against defendant for the sum of $3,513.00, plus costs.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the trial court's judgment affirmed.

STATEMENT OF FACTS

The two insurance policies in question were issued to Mary H. Pritchett on November 28, 1962, at Phoenix, Arizona. (See Exhibits 3 and 4.) The applications for the policies were prepared by defendant's agent, Nell Bailey, at the home of the Pritchetts in Phoenix, Arizona, shortly before the issuance of the policies. Present at this transaction were Mary H. Pritchett, her husband, Leon G. Pritchett, and Nell M. Bailey. (R. 62-64) The policies were issued and placed on a checkomatic plan so that every month defendant would deposit a draft on the Pritchett bank account for payment of the monthly premium. (R. 66) The first check was given to Mrs. Bailey at the time that the applications were filled out and signed. (R. 67)

Thereafter, on May 20, 1963, Mary Pritchett was admitted to the South Side District Hospital for an exploratory operation. She was discharged from said hospital on June 9, 1963, and thereafter entered the L.D.S. Hospital in Salt Lake City, and was in said hospital a total of 98 days between the time of entry and her death, which occurred January 12, 1964. (R. 61, Exhibits 1, 6) When Mary Pritchett was admitted to the L.D.S. Hospital in June of 1963, following the

hospitalization in Phoenix, she was diagnosed as having cancer, described as a "generalized metastatic carcinomatosis" from which she eventually died. The primary lesion was never found. (R. 132)

The application blank attached to the medical-surgical policy contained the following question:

> "9. Have you, or any member of your Family Group to be insured, received medical or surgical advice or treatment within the past three years?"

The answer was given as:

> "Yes, as listed."

Beneath this question there was a small space for an answer, and the following was given:

> "2-28-62," under the heading of Nature of Illness or Accident, "Food poisoning, completely O.K."

And under Doctor:

> "McKeown, Phnx, Ariz."

The application blank for the Family Group Hospital Expense policy contained a question, 8B, which asked:

> "Have you or any dependent member of your family ever been treated for, or to the best of your knowledge and belief ever had any of the following:"

followed by a lengthy list of diseases and disorders of various parts of the body, followed by the words:

"If so, give full details."

In the small blank furnished for the details, the date was given as "2-28-62," under Nature of Illness, Operation, or Accident,

> "Food Poisoning, ate tainted meat at restaurant, completely recovered."

Under Doctor:

> "McKeown."

Address of Doctor:

> "926 East McDowell Road, Phoenix, Arizona."

9(b) asked if recovery was complete with no remaining complications, to which the answer "Yes" was given.

Defendant claimed in its defense that the foregoing answers to these questions on the application blanks were falsely and fraudulently made by the applicant, and that therefore defendant has a complete defense as to said policies.

Doctor Vernon L. Stevenson, a local surgeon, testified as to the prior medical history of Mary Pritchett. He stated that on November 24, 1961, he operated on Mary Pritchett for a punctured duodenal ulcer, performing a surgical procedure known as "gastrojejunostomy." This operation involved circumventing the ulcer area by bringing the loop of the small bowel up

and attaching it to the stomach and performing a new opening from the stomach into the small intestine, by-passing the ulcer. He stated that Mrs. Pritchett made a complete recovery from this operation. (R. 126, 127) The doctor estimates that recovery was made in this case after approximately three months. The doctor next testified that in 1956 he operated on Mrs. Pritchett for the removal of her gall bladder, and that at that time he corrected some old adhesions from the prior stomach operation. He testified that she made a complete recovery from the gall bladder operation. He stated that from that time until February of 1962 Mrs. Pritchett was well and had no medical problems, when she developed a gastro-enteritis from a food poisoning episode. (R. 127, 128) Dr. Stevenson testified that he performed a surgical procedure which relieved the gastro-enteritis caused by the food poisoning incident and that she made an excellent recovery. He testified that she was in the hospital no more than eight days and was discharged without any symptoms. This operation was performed on May 27, 1962. (R. 130, 131) He testified that thereafter he communicated with her by telephone and that she made a good recovery. At the time of this surgical operation the doctor testified that he also performed an exploratory operation, and as of that time made a determination that there was no cancer present. (R. 131) Concerning Mrs. Pritchett's physical condition, following the surgery of May, 1962, the doctor testified as follows: (R. 133, 134)

"Q If you had been asked to give an opinion as to Mrs. Pritchett's physical condition following the time when she was hospitalized for this surgery, stomach surgery in 1962, following her release from the hospital and based on reports to you, what would your opinion have been?

"A Her condition was very good at that time.

"Q So far as you were concerned was she in excellent health?

"A That is right. The subsequent history is one of the things or the prejudices that we see all over America so far as cancer is concerned.

"Q Is there any way you have of accounting for how this cancer happened?

"A I wish I knew the answer to that.

"Q Other than the normal incidents of age, taking Mrs. Pritchett as she was following this stomach surgery, other than the ordinary incidents of age, would you think that she was a good risk as far as medical insurance was concerned?

"A I would say she was.

"Q Do you have an opinion as to whether or not she was a good risk as far as health insurance is concerned?

"A Yes, for her age group."

Mr. Pritchett testified that at the time the applications for the insurance policies were made out that he and Mrs. Pritchett told Nell Bailey about all of Mrs. Pritchett's prior medical history, including the surgery following the food poisoning incident. He fur-

ther stated that they even informed Mrs. Bailey about the trip by airplane to Salt Lake for the operation and that they furnished her with the names of the doctors in Salt Lake and Phoenix, to which Mrs. Bailey answered:

"That will be sufficient." (R. 73, 74)

Nell Bailey testified by way of deposition that she recalled the incident when the application blanks were filled out by her for Mrs. Pritchett. She stated that Mrs. Pritchett had told her about prior operations which she felt were too remote to be of interest to the insurance company, and that she informed her of a food poisoning incident. Mrs. Bailey was questioned concerning an affidavit which she had signed on December 10, 1963, reading in part as follows: (Ex. 3 to Deposition)

> "*** that during the time of my making of the application, as I said, Mary Pritchett told me that she had had operations more than three years previous thereto; that I made no reference to said operations on the application because they occurred over three years prior to the date of the application with one exception, which involved an operation performed on Mary Pritchett on or about May 27, 1962; that I was fully informed of the circumstances of this operation, but made no reference to the same, specifically, because I was also informed that it related to a food poisoning which the said application had already stated she had been treated for elsewhere in the application and from which she had fully recovered at the time of the execution of said application."

Mrs. Bailey was questioned about the above language after said language was repeated, as follows: (R. 98)

> "Now, my question is: Is what you said in that affidavit that I have just now read — is what you said in that affidavit that I just now read, correct in all respects?
>
> "A If it pertains to this paragraph where I have this medical information, yes.
>
> "Q Well, does it?
>
> "A Yes, it applies to this period. This is the food poisoning period.
>
> "Q You are now pointing to, under paragraph 9-a, where it says: '2-28-62, food poisoning, ate tainted meat at restaurant, completely recovered.' Then next to that the doctor is listed as McKeown, and his address, as you have already stated?
>
> "A That's right."

Mrs. Bailey further testified as to the procedure the company goes through when it receives these applications.

> "Q When the company gets it, the claims department, they usually investigate any medical history that you put on a patient within the last three years; that they investigate. From your experience as a saleslady for this company, was that their usual method of proceeding?
>
> "A Indeed. And if it needed a rider to be put on the policy, they always put a rider on it. The claims took it — the underwriters, I should

say, took it before they issued the policy, and they investigated, and if they needed a rider to be put on it, they issued a rider when you got the policy.

"Q But there was no rider that was placed on these policies?

"A No, no.

"Q Now, who is it in the company that usually makes these investigations?

"A She is the head of the underwriters.
Mr. Ross: Claire Dewey?

"A Claire Dewey."

Mrs. Bailey further testified as to her work for defendant company and as to the discretion given to her by the company and the confidence shown in her by the company: (R. 101)

"Q Did you, while working for this company, customarily when taking these applications, not list any operations that were more than three years before?

"It is according to the operation. For ten years I have been in the insurance business, and I have never been questioned about my underwriting. So I have managed offices and hired agents and trained them. A gall bladder operation, it was no malignancy, is immaterial fourteen years ago. An appendix operation, something that isn't — a cancer operation, something that serious, even if it has been five years ago, you still — or how long ago — you list it. But something — if you had an ingrown toenail taken off or your tonsils taken out, usually companies aren't interested in that kind of information.

"Q Did the company give you a certain amount of discretion as an agent in what you put —

"A Yes.

"Q — in and what not to put in these applications?

"A Yes. I have never been questioned in ten years about my underwriting by the insurance department or any company."

Mrs. Bailey further testified that she put her husband's name on the policies to help him win a prize, which he did. (R. 111, 112)

Defendant offered into evidence a specimen of a rider which defendant's witness claimed would have been attached to the Pritchett policy if complete information had been known by the company. (See Exhibit 12) The rider excepted the following:

"1. Stomach ulcer, disease or operation involving the stomach, pylorous or duodenum,

2. Intestinal obstruction or any digestive disease or disturbance, adhesions, hernia, or

3. Any disease or disorder of the biliary tract, and/or

4. Any cardio-vascular disease."

The court ruled in favor of plaintiff in a memorandum decision. (R. 9-11) In the court's Amended Findings of Fact and Conclusions of Law, the court ruled as follows, in part: (R. 44-46)

"4. That the applicant's application for said insurance policy was prepared by the agent, Nell Bailey at the home of Leon G. Pritchett and Mary H. Pritchett and duly signed by Mary H. Pritchett on November 28, 1962; that at the time and place Mary H. Pritchett was aware of the fact that she had failed to make a full disclosure of all the medical history concerning her past medical history in the application submitted to the company, but had so indicated to the agent, Nell Bailey, that such was so, and left the policy application in the form submitted in the hope of receiving coverage that would not have been granted had she insisted on a full medical history being covered; that Nell Bailey, the agent of the Defendant, in the course of her employment was also aware that a full disclosure had not been made and encouraged Mary H. Pritchett not to include any other information and nevertheless prepared and submitted the application for the insurance policy in question, Nell Bailey prepared and sent in the application for the insurance policy in question, the Defendant company encouraged incomplete disclosure of medical history by providing a form with grossly inadequate space provided for the information sought and with reasonable care either knew or should have known that it was highly probable that the form in question did not contain a full medical history but was willing to extend coverage on the application with a desire to accept the premiums that it likley wouldn't have received had it insisted on full disclosure of medical history and the resulting elaborate exclusion from coverage that would follow, but relied on the possibility of gaining advantage by claiming policy defenses in case of illness.

"5. That had a full disclosure been made to Defendant company the company would have attached a rider which would have excluded benefits resulting from disease of the alimentary canal; that Mary H. Pritchett died of a cancerous condition which affected the alimentary canal, but no evidence was presented as to the origin of the cancer and therefore the court is unable to find that Mary H. Pritchett died of a disease of the alimentary canal, other than that her death was secondary to a general spread of cancer throughout the abdominal area; that had a rider been attached to the policy, excluding diseases of the alimentary canal, said rider would not have excluded medical expenses resulting from cancer of an undisclosed origin from which Mary H. Pritchett died."

And the following Conclusions of Law, in part:

"2. That Defendant has no available policy defense as to plaintiff's claims on the insurance policies in question, even though all parties have unclean hands, for the reason that the company has encouraged inadequate and incomplete reporting of past conditions of health.

"3. In any event, any omissions on the part of Mary H. Pritchett in regard to information concerning her past condition of health were immaterial omissions in the case at bar for the reason that full knowledge would not have resulted in a rider excluding the claim in question.

"4. The aforesaid Conclusions of Law accord with public policy considerations in checking medical insurance companies from encouraging insufficient and inadequate information on application blanks."

ARGUMENT

POINT I

THE INSURANCE COMPANY WAIVED ANY POLICY DEFENSES IT MAY HAVE HAD.

There being competent evidence supporting the findings of the trial court, said findings cannot be disturbed on appeal. See *Seamons v. Andersen, et al.,* (1952) 122 Utah 497, 252 P.2d 209; *Buckley v. Cox,* 122 Utah 151, 247 P.2d 277; *Jensen v. Gerrard,* 85 Utah 481, 39 P.2d 1070.

Appellant in its brief has blithely accused Mary Pritchett of fraud and mistakenly claims that the trial court found her guilty of fraud. This is not true. Had defendant read the case of *Pace v. Parrish,* (1952) 122 Utah 141, 247 P.2d 273, it would have found that there are nine elements which a party must prove before he can prove fraud. Since defendant alleged fraud, its burden was to prove it by clear and convincing evidence. See *Condas v. Adams,* 15 Utah 2d 132, 388 P.2d 803. This, defendant failed to do, and the trial court did not so find. The balance of this brief will deal specifically with defendant's failures in this regard.

A — DEFENDANT'S AGENT WAS FULLY INFORMED — HER KNOWLEDGE IS IMPUTED TO THE COMPANY.

There can be no question but that knowledge obtained by defendant's agent, Nell Bailey, in the course

of her employment as an insurance agent, is imputed to and becomes the knowledge of the defendant insurance company. Accordingly, defendant was charged with knowing what Nell Bailey knew. The general rule is stated at 29-A Am.Jur., INSURANCE, par. 1019, at page 192:

> "The general rule of agency that the principal is charegable with, and is bound by, the knowledge of or notice to his agent received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends, is fully applicable to agents of insurance companies. The general rule of insurance law is that the knowledge of, or notice to, an insurance agent as to a matter within the scope of his authority, and which is acquired while the agent is acting within the scope of his authority, is charegable to the insurer. The agent's knowledge is in law the knowledge of the insurer, although such knowledge is not in fact communicated to the insurer.
>
> "By imputing the agent's knowledge of violation of policy conditions to the insurance company, the latter has the knowledge necessary to relinquish a known right under the theory of waiver. This rule of imputation of knowledge is not based upon the theory of actual notice but rather on considerations of policy, namely, that where one seeks the advantages of doing business through general agents, fairness to the other party demands that the principal be in no better position than if he were transacting the business in person."

This rule has been followed in Utah. See *Bednarek v. Brotherhood of American Yeomen,* 38 Utah 67, 157

P. 384; *Farrington v. Granite State Fire Insurance Company of Portsmouth, et al.,* (1951) 120 Utah 109; 232 P.2d 754. Also the following authorities from other jurisdictions:

Van Ross v. Metropolitan Insurance Company, 134 Kan. 479, 7 P.2d 41;

Finkle v. Western & Southern Life Insurance Co., 171 Ohio 495, 172 N.E.2d 311;

Pfiester v. Insurance Co., 85 Kan. 97, 116 P. 245;

Farmers & Bankers Life Insurance Co. v. Baxley, 202 Okl. 531, 215 P.2d 941; and

Rocky Mountain Fire & Casualty Co. v. Rose, (1963) 62 Wash. 2d 896, 385 P.2d 45.

A case somewhat similar to the case at bar is the case of *Farmers & Bankers Life Insurance Co. v. Baxley,* supra. In that case the applicant disclosed to the agent a history of female disorders and a prior operation for female trouble. The agent told her that this was a minor matter of no consequence and accordingly did not include her statement in the application, which he filled out and she signed. The court held that the policy was not voidable for fraud under the general rule as stated above. For a good statement of the general rule, see Appleman, INSURANCE LAW & PRACTICE, Vol. 17. Par. 9401, at page 1, where it is stated as follows:

> "An insurer cannot avoid a policy by taking advantage of a misstatement in the application,

material to the risk, not due to the insured's bad faith. It is the duty of an agent for an insurance company to prepare the papers under his supervision so that they will accurately and truthfully state the result of the negotiations, and the agent's failure to do so is, in legal effect, the fault of the company. Thus, the insurer's agent owes it a duty to correctly record the answers to questions contained in the application."

It is further stated in Appleman, Vol. 17, par. 9401, at p. 11:

"Even knowledge on the part of the insured that the insurer's agent is acting adversely to the insurer, without participation in such action by the insured with fraudulent intent, does not prevent the agent's knowledge from being imputed to the insurer. Accordingly, under these rules, even if matters are misrepresented in an application, and the insured is at fault in some respect for such misstatements, if the agent had actual knowledge of the true situation concerning which the misrepresentation was made, or knew that such statements were false, the company cannot defend upon the basis of their falsity. And the contention of the insurer, which had refused payment because of fraud in misstating facts in procuring the policy, that its knowledge of the falsity of a statement made, being only partial, would not relieve the taint of fraud, was considered unmeritorious."

According to the record in this case, Mrs. Pritchett and her husband fully informed the agent, Nell Bailey, of her past medical history. The testimony of Nell Bailey corroborates the testimony of Leon G. Pritchett

on this matter. Leon Pritchett testified that Nell Bailey was fully informed, and that she made the decision as to how the application was filled out. Nell Bailey admitted that she was told of the prior operations, which she considered too remote to be of importance to the insurance company, and further she admitted that she was told of the food poisoning incident and its results, but that since the applicant stated that she had made a complete recovery, she did not go into detail. There was not one shred of evidence that Mrs. Pritchett withheld information or misstated any facts.

The fact that Mrs. Pritchett was in good health for a woman of her age, was corroborated by the testimony of Dr. Stevenson, who knows more about Mrs. Pritchett's condition at the time in question than any other person. Dr. Stevenson testified that Mary Pritchett made a complete recovery from the surgery in May of 1962 and that her progress was followed by him thereafter by telephone conversations. He testified that as part of the same operation, he performed an exploratory procedure and found no cancer. He testified that following the operation, Mary Pritchett was a good risk for health insurance. This evidence shows beyond any doubt that at the time the application was made for this insurance, Mary Pritchett was in good health and indeed had made a complete recovery from the food poisoning incident of February, 1962.

Such information having been furnished, Nell Bailey had the absolute right to proceed as far as she

desired with this inquiry. Nell Bailey had sold insurance for approximately ten years and testified that she had never had any problems over any of her applications and that the company had faith in her as an insurance agent. Her knowledge was imputed to the company, and the company waived any defenses it could have had for incomplete information on the application blank.

B — THERE WAS NO INTENT TO DEFRAUD ON THE PART OF MARY PRITCHETT.

It is clear that the law in Utah is that mere falsity of answers to questions propounded is insufficient, if not knowingly made with intent to deceive and defraud. See *Wootten v. Combined Insurance Co. of America* (1964) 16 Utah 2d 52, 395 P.2d 724;

Chadwick v. Beneficial Life Insurance Co., 54 Utah 443, 181 P. 448;

New York Life Insurance Co. v. Grow, 103 Utah 285, 135 P.2d 120;

Zolintakis v. Equitable Life Assurance Society, 10 Cir., 97 F.2d 583, 108 F.2d 902;

Prudential Insurance Co. of America v. Willsey, 10 Cir., 214 F.2d 729.

Defendant failed to prove any such fraudulent intent on the part of Mary Pritchett.

1. THE AGENT USED HER DISCRETION IN ACCORDANCE WITH THE AUTHORITY GRANTED TO HER BY THE COMPANY IN FILLING OUT THE FORMS.

Concerning the trust which the insurance company reposed in Nell Bailey, which was not disputed by the defendant, Nell Bailey testified at R. 101:

> "It is according to the operation. For ten years I have been in the insurance business, and I have never been questioned about my underwriting. So I have managed offices and hired agents and trained them. A gall bladder operation, it was no malignancy, is immaterial fourteen years ago. An appendix operation, something that isn't a cancer operation, something that serious, even if it has been five years ago, you still — or how long ago, you list it. But something — if you had an ingrown toenail taken off or your tonsils taken out, usually companies aren't interested in that kind of information.
>
> "Q Did the company give you a certain amount of discretion as an agent in what you put —
>
> "A Yes.
>
> "Q — in and what not to put in these applications?
>
> "A Yes. I have never been questioned in ten years about my underwriting by the insurance department of any company."

Certainly a person with no knowledge out of the ordinary concerning the insurance business applying

for an insurance policy and doing business with an experienced agent, can rely on the agent knowing her business and knowing how to fill out answers to questions in the application form. Mary Pritchett and her husband could rely on Nell Bailey knowing what to put in and what not to put in. On this subject it is stated in Appleman, INSURANCE LAW & PRACTICE, Vol. 17, par. 9402, at p. 13:

> "Accordingly, when the facts stated by an applicant to an authorized agent are disregarded by the latter as not material, the insurer is estopped to rely upon such facts to defeat a recovery. And where the facts are fully disclosed by the applicant, the failure of the agent to make the application contain such information or his omission of certain of such material facts therefrom is chargeable to the insurer, and not to the insured.
>
> "Similarly, where an agent advises the insured what facts are material, an omission will not vitiate the policy where the applicant has acted in good faith. *** And where an agent propounds a prescribed categorical list of questions and leaves out such answers as would work a refusal of the policy, and the insurer issues a policy, it, and not the insured, is responsible for the situation so arising."

It is stated at 29-A Am. Jur., INSURANCE, par. 1059, at p. 226:

> "In cases in which a soliciting or other authorized insurance agent, in the course of preparing an application, suggests an answer to a question

therein or interprets its meaning and effect, the insurer is responsible for the insertion of the false answer, on the theory that the agent, in recording facts stated by the applicant when making out an application for a policy of insurance, acts as the agent of the company rather than of the insured, so that his acts, representations, and mistakes are those of the insurance company. Thus, where there are no circumstances to arouse the suspicions of an applicant who reveals a history of previous illness to the agent, and the agent advises the applicant that such illness is of no importance, the law does not require the applicant to go further and question the authority or judgment of the agent to decide whether the information is sufficiently important to merit consideration in the application."

Nell Bailey is the one who decided what was to be put in the application. She was the one entrusted by defendant to perform this function. Not only is the knowledge which she received imputed to the company, but the company is charged with any errors and omissions made by Nell Bailey in the course of her employment and cannot charge Mary Pritchett with fraud when it was Nell Bailey who made the omissions of which defendant so vehemently complains. Natural justice as well as the settled law cries out at the injustice of defendant charging Mary Pritchett with fraud.

2. THE COMPANY ENCOURAGED INSUFFICIENT ANSWERS BY PROVIDING FORMS WITH INADEQUATE SPACE FOR THE INFORMATION SOUGHT.

The trial court was impressed with this argument and made a specific finding on it. In its Amended Findings the court held in part: (R. 45)

> "The defendant company encouraged incomplete disclosure of medical history by providing a form with grossly inadequate space provided for the information sought and with reasonable care either knew or should have known that it was highly probable that the form in question did not contain a full medical history but was willing to extend coverage on the application with a desire to accept the premiums that it likely wouldn't have received had it insisted on full disclosure of medical history and the resulting elaborate exclusion from coverage that would follow, but relied on the possibility of gaining advantage by claiming policy defenses in case of illness."

It is submitted that the court is holding in the aforesaid finding that defendant company did not in fact rely upon the information furnished in the application forms with inadequate space for complete answers, and further that the company has waived any defenses it might otherwise have for omissions from said application blank.

The court also stated, at a discussion following the presentation of the case, at R. 175:

> "THE COURT: The agent, yes. And I further find that the way this was conducted, obviously from these forms, that the company well knew that the agent was given full information. But they didn't give you enough information

that it obvious — any person who gives you three lines and you are supposed to give them all of this information. 'Have you or any dependent members of your family ever been treated for or to the best of your knowledge and belief ever had any of the following: hernia, high blood pressure, epilepsy, syphilis, fainting spells, dizziness, rheumatism, sugar or albumen, tuberculosis, ***, throat or any other illnesses, operation or injury? — State in full detail.' You can not tell what is wrong with an eight-year-old boy in three lines. I think the policy ought to be written for defenses."

Accordingly, the trial court, based on the nature of the application forms. (Exhibit 3, 4) has specifically found that the company itself has encouraged inadequate and insufficient answers to the questions on its application forms. This amounts to a finding that defendant has waived any defense for insufficient answers and that it should be estopped from claiming any defense for the inadequacy that it has encouraged.

3. APPLICANT FURNISHED ADEQUATE INFORMATION TO MAKE IT EASY FOR THE COMPANY TO MAKE FURTHER INQUIRY IF IT DESIRED — DEFENDANT IS CHARGED WITH THE INFORMATION A REASONABLE INQUIRY WOULD HAVE REVEALED.

The application form furnished adequate information to allow defendant company to easily make inquiry concerning the food poisoning incident and its sequelæ.

The application blank contained the name of the doctor who treated Mrs. Pritchett, together with his address in Phoenix, Arizona. A phone call would have revealed any further information desired by defendant. This defendant chose not to do. This brings to mind a statement contained in the case of *Wootten v. Combined Insurance Company of America,* supra, at page 726:

> "The failure of respondent to volunteer the information that her husband had resigned his job in July because with the added work his weak leg was being adversely affected cannot reasonably be considered as sufficient evidence upon which to base a finding of intent to defraud. Appellant had sufficient knowledge of the physical disability of respondent's husband to ascertain all the facts it needed as to its extent, if it had deemed it important, by either asking further questions or conducting an investigation; and *it cannot blind itself from ascertaining the truth and then claim willful misrepresentation of the truth on which it relied in order to avoid payment under a policy.* This would appear to be especially applicable in the instant case where the accidental death of respondent's husband was not in any way related to his physical defect." (Italics ours.)

This court in the *Wootten* case held that the insurance company has certain duties which it must perform. It cannot stand idly by and then claim defenses for omissions which it could have easily avoided. This duty is clearly stated at 29-A Am. Jur., INSURANCE par. 1026, at page 199:

"The rule that whatever puts a person on inquiry, amounts, in law, to notice of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed is applicable, according to some authority, to charge an insurer with notice. This is in line with the general rule followed by the majority of the courts that have passed upon the question, that the principal is charged with the knowledge of that which his agent, by ordinary care, could have known, where the agent has received sufficient information to awaken inquiry."

Not only did Nell Bailey have sufficient information to awaken her to a duty of making further inquiry if she desired, but the company on the form itself had adequate information to put it on a duty of inquiry to make further investigation. A simple telephone call would have revealed any additional information that the company desired concerning the food poisoning incident and its sequalæ.

Nell Bailey clearly focused this duty in her testimony at R. 96:

"A No. She said they ran a thing down into her stomach. I don't know enough about operations to know the procedures of the doctor. But she said they had to run down into her stomach and pump this food out, and she almost died. And she didn't know what they called the operation, so I put the doctor's name down and his address where he may be contacted by the company."

And again, R. 97:

"A Well, in our applications we usually pu the doctor's name and his address so that the com pany can go into that. Their claims departmen usually goes into that.

"Q Does the company usually investigate

"A Yes, indeed.

"Q — there applications?

"A Yes, indeed. If there is a medical histor like this, they usually go into it."

Appelman, Vol. 1, par. 220, p. 359, states:

"On the other hand, an insurer cannot com placently rely upon statements made by the in sured where the type of information is of a char acter suggesting a cautionary investigation as t the accuracy of the statement given. And when the insured discloses that he has undergone a operation and furnishes the company with th name of the attending physician, it has ampl information from which to investigate furthe and cannot complain that the insured failed t relate an illness ensuing upon such operation Furthermore, if the general nature of the dis order is stated, no more ample details need b given, in the absence of inquiry."

POINT II

THE CLAIMED FRAUDULENT CONCEALMENTS ARE IMMATERIAL.

The Utah statutes require that a misrepresentation or concealment must pertain to a "material fact" in order to give defendant a defense. Sec. 31-19-

Utah Code Annotated, 1953, as amended in 1963, states as follows:

> "*** Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
>
> "(a) Fraudulent; or
>
> "(b) Material either to the hazard assumed by the insurer; or
>
> "(c) The insurer in good faith either would not have issued the policy or contract, or would not have issued, reinstated, or renewed it at the same premium rate, or would not have issued, reinstated, or renewed a policy or contract in as large an amount, *or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.*" (Italics ours.)

Section 31-19-8 as it existed prior to the enactment of 1963, reads in part as follows:

> "The falsity of any such statement shall not bar the right to recovery under the contract unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

The court specifically found that the concealments complained of were not material to the risk assumed by the insurance company and therefore could not afford the basis for a defense. The court held in Finding of Fact No. 5: (R. 45)

"That had a full disclosure been made to defendant company the company would have attached a rider which would have excluded benefits resulting from disease of the alimentary canal; that Mary H. Pritchett died of a cancerous condition which affected the alimentary canal, but no evidence was presented as to the origin of the cancer and therefore, the court is unable to find that Mary H. Pritchett died of a disease of the alimentary canal, other than that her death was secondary to a general spread of cancer throughout the abdominal area; that had a rider been attached to the policy, excluding diseases of the alimentary canal, said rider would not have excluded medical expenses resulting from cancer of an undisclosed origin from which Mary H. Pritchett died."

And in Conclusion of Law No. 3: (R. 46)

In any event, any omissions on the part of Mary H. Pritchett in regard to information concerning her past condition of health were immaterial omissions in the case at bar for the reason that full knowledge would not have resulted in a rider excluding the claim in question."

The foregoing Finding of Fact and Conclusion of Law by the court were amply supported by the evidence in the case. Instead of a situation where a company either accepts a risk or does not accept a risk the defendant in writing the type of insurance policy in question could accept the general risk and protect itself as to specific conditions by attaching riders. In this case the evidence showed that the defendant, even with full information, would have still issued the policy

but would have attached a rider excluding diseases of the alimentary canal. The court specifically found that Mary H. Pritchett did not die of any such disease but of cancer of an undisclosed origin. Accordingly, even had the rider been attached to this policy, Mary H. Pritchett's claim would have still been payable. This situation falls squarely within the requirements of the Utah Statutes and general case law that concealment of a fact not material will not avoid a policy claim. The *Wootton* case, supra, is a good example of a claimed omission being immaterial.

Another Utah case which held that a claimed misrepresentation was not material to the risk is the *Farrington* case, supra. In that case the defendant asserted that the representation that the building was occupied as a skating rink was a fraudulent misrepresentation, whereas ,the true fact was that at the time of the application for insurance, part of the building was dismantled and the building was vacant. The court stated in part as to the requirement that the misrepresentation be material at page 118:

> "There is no evidence in the record that the fact that the building was partly dismantled and vacant would increase the risk of fire loss. Although generally a vacant building has a greater hazard of loss by fire, the fact that the electric power had been cut off and there was no danger from smoking by skating patrons might indicate to the contrary. From ought we know, it is as likely that there was lesser risk as it is that there was greater. At least there is no evidence from

which we can determine that even if there ha been concealment or misrepresentation that was material to the risk."

In Appleman, INSURANCE LAW & PRAC TICE, Vol. 1, par. 214, p. 325, it is st ated:

> "Some courts have held that in order to pre vent a recovery on the basis of misrepresentatio as to present health or prior disease, it is necessar to show that the misrepresentation was of material matter and induced the issuance of th contract. Following that rule, it would be hel that the risk itself must be actually affected, an unless the matter concealed and misstated woul have a tendency to increase the risk or to shorte the life, the policy must not be avoided."

The evidence on which the trial court relied in th case at bar specifically showed that the defendant woul have accepted the risk but would have merely attache a rider which would not have eliminated the claim i question.

The case of ***Hale v. Sovereign Camp WOW***, 1 Tenn. 555, 226 S.W. 1045, involved a representati that the applicant had not consulted a physician durin the preceding five years. The court held that this w insufficient to defeat the action on the benefit certificat though during such time he had summoned a doct during an attack of asthma from which he promp recovered and though during such time he had procur a prescription from a doctor to reduce his flesh at a tim when he was not sick, where the death was caused influenza, since such representations were as to matte

which in no way contributed either directly or indirectly to his death.

The case of *Clegg v. John Hancock Mutual Life Insurance Company,* Mo. App. 1940, 141 S.W.2d 143, was an action on a life policy in which there was evidence that the insured had been treated for glandular trouble in 1936 and 1937 and that he died from cancer in 1938. When he applied for the insurance policy, he stated that he had not received treatment for diseases mentioned, including cancer, and had not within five years been treated for any other disease. The court held that if the disease for which he was treated did not cause or contribute to his death, the misrepresentation was not material to the risk.

In *People's Mutual Life Association v. Cavender,* Tex., Civ. App. 1932, 46 S.W.2d 723, the insured represented in an application that he had never undergone a surgical operation, notwithstanding the fact that he had a prior operation for sinus trouble from which he had entirely recovered. The court held that such a misrepresentation was not material and denied the defense submitted by defendant.

Also see *Poignee v. Monumental Life Insurance Co.,* Mo. App. 1945, 157 S.W.2d 531; *Sovereign Camp WOW v. Gibbs,* 217 Ala. 108, 114 So. 915; *Metropolitan Life Insurance Co. v. Rowe,* 69 Ga. App. 192, 24 S.E.2d 826; *Wells v. Jefferson Standard Life Insurance Co.,* 211 N.C. 427, 190 S.E. 744, (Statement in application for life policy that applicant had not

consulted a doctor for any cause not included in previous answers held not a material representation such as to avoid policy, though about a month previous applicant had consulted a physician with reference to half a degree of malarial fever of mild type where applicant's death was not traceable to malaria); *Prudential Insurance Co. v. Sellers,* 54 Ind. App. 326, 10 N. E. 894, (Requires that treatment be for some ailment which seriously affects the health of the insured.

An Idaho case which is helpful is the case of *Russell v. New York Life Insurance Co.,* (1922) 3 Idaho 774, 209 P. 273. In that case the Supreme Court affirmed a judgment against an insurer on a policy of life insurance where it appeared that the insured had stated in his application for such policy that he had never suffered any ailment of the stomach, that he had not consulted a physician for any other ailment or disease not included in answers to specific questions and that he had not consulted any physician or physicians within five years. The evidence showed that more than two years before the issuance of the policy, the insured had consulted a physician, who was a medical examiner for several insurers, complaining of indigestion and overwork, that the patient acting upon the advice of his physician took a rest of a month or so but a year later the patient returned to the physician complaining of practically the same thing, and that the physician then examined him very carefully and found that he had nothing more than gastric neurosis, which was nothing serious and would not in any way shor

his expectancy of life. The evidence further showed that the cause of death was an automobile accident.

The court stated that even if the applicant had answered the questions truthfully, the practice of the medical examiners who have been to make an inquiry of the physician who had treated the applicant with special reference to whether there was a malignant disease or ulcers of the stomach or intestines; and that if the inquiry had been made of the physician, the medical examiners would have discovered nothing which would have materially affected the risk, so that the insurance contract would have been issued in spite of the disclosure of such treatment.

In dealing with the question of materiality, the Supreme Court of Tennessee in the case of *Interstate Life & Accident Co. v. Potter,* 17 Tenn. App. 381, 68 S.W.2d 119, stated that a misrepresentation would be material if it would naturally and reasonably influence the insurer and induce it to decline the application. The court quoted the following language from another Tennessee case:

> "It is not to be left to the insurance company to say after a death has occurred that it would or would not have issued the policy had the answer been truly given. It is true the practice of an insurance company with respect to particular information may be looked to in determining whether it would naturally and reasonably influence the judgment of the insurer, but no sound principle of law would permit a determination of this question merely upon the say-so of the company

after the death has occurred. The matter mis- represented must be of that character which the court can say would reasonably affect the in- surer's judgment."

The court went on to hold a misrepresentation no material where it appeared that in reply to the reques in the medical examination: "Name below all cause for which you have consulted a physician in the pas ten years," the insured noted one instance of influenz lasting a short time and having no permanent effec It appeared that in the same year in which insured ha had the attack of influenza, he had also consulted th same physician and then subsequently a second physi cian, who diagnosed his trouble as a low-grade pyelit or inflammation or infection in the kidney-pelvis, to gether with systitis or inflammation or infection of th prostate gland, such an infection apparently being du to colon bacillus, which were not serious unless the developed into some other ailment; that the secon physician treated him on nine different occasions an then gave a letter to insured's regular physician con cerning the ailment and treatment therefor; that th treatment consisted of injections of urotropine into vein for the purpose of washing out the kidneys an removing pus therefrom. The insured died about a yea after the issuance of the policy from cancer of the live It appeared also that he had diabetes. The insured wa active at his work during the period of treatment pri to the application for his policy, and his physician, wh saw him nearly every day, as he went to and from h work, considered the insured to be in good health a

did not include the consultations for the infection in his report as medical examiner because he considered them as minor troubles which had passed away.

In conformity with the spirit of the general law and case law heretofore cited, the determination of materiality cannot be left in the insurance company's hands to come to court and state whether or not an omission or misrepresentation is material. The trial court in this case has specifically found that the claimed omission was as to an immaterial fact.

The only possible omission which could be claimed by defendant is the fact that the application does not contain details as to the operation in May of 1962, caused by the food poisoning incident of February, 1962. If the company had had full information, it would have merely ascertained that this stomach operation was caused by the food poisoning incident and was successfully handled by Dr. Stevenson. It would have also found that Dr. Stevenson made a specific finding at that time, pursuant to exploratory procedures, that there was no cancer in the abdominal area of Mary H. Pritchett. It would have also found that Mary H. Pritchett made a full and complete recovery from this surgical procedure and that at the time of the issuance of the policy, she was in good health and was indeed a good insurance risk.

Defendant failed utterly to sustain its burden of proving by clear and convincing evidence that the operation of May, 1962, had any connection at all with

her death from cancer of an undisclosed origin. The court has so found, and the court's finding is supported by the record.

CONCLUSION

The judgment of the trial court is supported by competent evidence in the record. The evidence shows that defendant's agent, Nell Bailey, was fully informed of Mary H. Pritchett's prior medical history. The evidence shows that the company was given adequate information to make further inquiry if it had desired. The evidence shows that the claimed omission was immaterial to the risk assumed by the company, and that if the company had complete information, the most it would have done would have been to attach a rider which would *not* have excluded the claim in question. The evidence shows that complete information in the hands of the insurance company would have shown that Mary H. Pritchett was in good health at the time of the issuance of the policy, and that she had made a complete recovery from the surgery of May, 1962. Defendant failed utterly to prove by clear and convincing evidence that Mary H. Pritchett was guilty of fraud.

Respectfully submitted,

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